United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7550

United States Court of Appeals
FOR THE SECOND CIRCUIT

B P/S

Docket No. 76-7550

JOHN D. DAVIS,

Plaintiff-Appellant,

—against—

RJR FOODS, INC.,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

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Introduction

This is an action brought in the federal courts by a former employee of defendant—RJR Foods, Inc. ("RJR Foods"). Plaintiff alleges that he was terminated by RJR Foods for reasons related solely to his age and that his termination gives rise to a cause of action under the federal Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 624-34 (1975); "the Age Discrimination Act"). Plaintiff concedes however that he has failed to meet either of two specific and separate jurisdictional prerequisites of the Age Discrimination Act. Plaintiff neither gave the Secretary of Labor notice of his intention to bring this action within the time periods specified by the Age Discrimination Act nor did he commence proceedings under available state law before bringing this federal action. As a result of plaintiff's failure to comply with either of these two jurisdictional requirements, and because no reason could be found for excusing plaintiff from either requirement, the

District Court for the Southern District of New York dismissed plaintiff's complaint for want of federal jurisdiction. It is from the order and judgment entered on such decision that plaintiff takes this appeal (A 67-75).*

In his brief on appeal, plaintiff seeks either to change settled law or to be granted an exception from the application of clearly held precedent. He does so on several theories: that his long delayed application to the Department of Labor satisfies the purpose of giving timely notice of intention to sue to the Secretary of Labor; that in any event equitable considerations warrant the tolling of this prerequisite to federal action; and that prior resort to state processes is optional not mandatory and thus not jurisdictional.

Plaintiff's first contention, that his contacts with the Department of Labor which occurred more than two years after the alleged wrongful termination constitute sufficient and timely compliance with the statutory requirement that notice be given to the Secretary of Labor of an intention to sue within 300 days of an alleged wrong, is unsupported by precedent. Further, as the District Court pointed out, there are no equitable considerations in this case which warrant suspension of this clear statutory mandate.

Secondly, plaintiff's claim that this Court should excuse entirely his failure to pursue existing state remedies because the statute allegedly does not require resort to them, contravenes not only the plain language of the Age Discrimination Act, but also perverts its clear intent that such local processes be utilized before resort to the federal courts.

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* All references to "A—" are to the Appendix. References to "Pl. Br.—" are to plaintiff's brief.

Counter Statement of the Issues

1. Whether, where a federal statute provides that prior to the bringing of an action in the federal courts notice of such intention to sue be given to the Secretary of Labor within 300 days of an alleged wrong, a complaint about such wrong, lodged only with the Department of Labor more than two years after its occurrence, constitutes sufficient and timely notice within the meaning of the statute.

2. Whether total failure to commence a proceeding with an available state agency fully authorized to grant relief bars resort to the federal court under the Age Discrimination Act.

3. Whether either of the two jurisdictional prerequisites of timely notice of intention to sue and of commencement of state proceedings is subject to equitable waiver and, if so, whether plaintiff is entitled to such waiver.

4. Whether plaintiff's claims are barred by the applicable statute of limitations.

Statement of the Case

Plaintiff, a lawyer, is a former brand director of RJR Foods (A 21, A 42). Plaintiff claims that he was unlawfully dismissed from his job for reasons related to his age in June, 1972, although he continued to receive certain benefits until October, 1972 (A 24-28, A 30). Plaintiff claims that he was employed by RJR Foods in 1962 at the age of 44 with RJR Foods' New York office, that he became the brand director of several lines of RJR Foods' products and that for each year of his employment he earned a salary and a bonus based upon his performance

under RJR Foods' incentive compensation plans then in effect (A 21-23). In addition to his earnings, plaintiff alleges he was entitled to various benefits including hospitalization, vacation, insurance, retirement, stock participation and savings plans and scholarship programs (A 23).

Plaintiff alleges that his performance was satisfactory (A 24), but that as part of a reorganization of its corporate structure, RJR Foods terminated him and a number of other executives over the age of 40 (A 24-27). Plaintiff claims that his termination was thus without cause and as part of a program to "intentionally, knowingly and voluntarily" dismiss him in violation of the Age Discrimination Act (A 25).

Plaintiff further alleges that on June 27, 1974, more than two full years after his discharge from RJR Foods on June 6, 1972, he filed a complaint with the United States Department of Labor in New York City (A 28). Plaintiff asserts that the Department of Labor investigated his claims, that its files show a "wilful violation of the Employment Act of 1967" but that the Department has failed and refused to protect the rights of the plaintiff (A 30). Plaintiff asserts in his complaint that "such notice of intention to sue, as could be given, was given to the Secretary of Labor of the United States" (A 30). The first apparent notice to the Secretary of Labor of plaintiff's intention to sue was filed with the Secretary of Labor on October 9, 1975 (A 52). There is no allegation in the complaint that any action had been commenced with the New York State Division of Human Rights or that notice of intention to sue was given to the Secretary of Labor within the time constraints provided by the Age Discrimination Act.

Plaintiff seeks either reinstatement and back salary from 1972 to date or in the alternative $500,000 in compensatory

damages (A 31). Plaintiff also seeks $5,000,000 as punitive damages (id.).*

RJR Foods moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction over the subject matter on the grounds that plaintiff had not complied with the two statutory requirements of timely notice to the Secretary of Labor or commencement of proceeding under state law before resorting to the federal courts (A 36-40).

In a memorandum opinion and order dated October 8, 1976, Hon. Morris E. Lasker dismissed the action on the ground that irrespective of whether the requirements of timely notice or of deferral to state action were strictly jurisdictional in nature or "more flexible rules subject to tolling or waiver in light of equitable considerations . . ." the facts of the case did not warrant departure from the "general rule" that both timely notice and state proceedings were required. Plaintiff's failure to meet either requirement barred his federal action (A 67-77).

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* While RJR Foods is willing to accept the complaint as factually stated for the sole purpose of the motion to dismiss, RJR Foods denies that plaintiff's conclusions of wrongdoing drawn therefrom are in any sense to be deemed as admissions. *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166, 168 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

ARGUMENT

I

The Age Discrimination Act Requires That Timely Notice of an Intention to Sue Be Given to the Secretary of Labor.

A. Notice of a Grievance to the Department of Labor More Than Two Years After Its Occurrence Does Not Constitute Timely Filing

The Age Discrimination Act provides that a person between the ages of 40 and 65 who believes that he has been subject to discrimination by his employer because of age may bring a civil action in the federal courts against such employer. However, the right of any person to bring such an action is terminated upon the commencement of an action by the Secretary of Labor to enforce such employee's rights under the Act (§ 626(c)).

In accordance with this clear statutory intention of permitting the Secretary of Labor to pre-empt any civil action which might be brought under the Age Discrimination Act, the Act requires any employee who intends to initiate litigation thereunder to give the Secretary of Labor at least 60 days' notice of his intention to file a civil action (§ 626(d)). Further the statute provides that "such notice *shall* be filed—

> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termina-

tion of proceedings under state law, which ever is earlier." (Emphasis added.)

Section 633(b) of the Age Discrimination Act provides that if the alleged unlawful practice occurs in a state which has a law prohibiting discrimination in employment because of age and authorizing or establishing a state authority to grant or seek relief from such practice, no suit may be brought under § 626 before the expiration of 60 days after proceedings have been commenced under state law, unless such proceedings have been earlier terminated.

Plaintiff was employed by RJR Foods' New York office (A 20, A 28) and New York State has a statute which prohibits discrimination in employment against persons for reasons based on age and which sets up a specific administrative body to enforce such statute. New York Human Rights Law § 296 *et seq.* (McKinney Executive Law 1972). Plaintiff does not contest the fact that the New York statute is one within the contemplation of § 633(b).

In view of the existence of the New York statute, it is assumed that the longer 300 day period in which to file a notice of intention to sue with the Secretary of Labor applies.*

The reasons for the giving of such notice of intention to sue are clear from the Age Discrimination Act itself. Upon

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* In his brief plaintiff apparently confuses these alternate 180 and 300 day periods for the filing of notice. Plaintiff contends that he was required to give notice of his intent to sue to the Secretary of Labor within 180 days of the alleged offense and also to bring a state proceeding within 300 days of the alleged offense (Pl. Br. 2, 12, 13, 16).

There is nothing in the Age Discrimination Act which governs the time within which the state proceeding must be commenced, since that is a matter of state law. Under applicable New York law, plaintiff had one year from the date of the occurrence of the alleged offense to bring his state proceeding. New York Human Rights Law § 297 (5) (McKinney Executive Law 1972).

receipt of notice of intent to sue from a prospective litigant the Secretary of Labor:

> "shall *promptly* notify all persons named [in the notice] as prospective defendants in the action and shall *promptly* seek to eliminate any alleged unlawful practice by inform[al] methods of conciliation, conference and persuasion." 626(d) (Emphasis added.)

The statute defines that time which will permit the Secretary to "promptly" notify a prospective defendant and to "promptly" attempt to eliminate the practice complained of as that which occurs no longer than 300 days after the alleged offense.

The basic purposes of requiring notice to be given to the Secretary of Labor either within 180 or 300 days is:

> "(1) To provide the Labor Department with an opportunity to achieve conciliation of the complaint *while the complaint is still fresh and* (2) *to give early notice to the employer of a possible lawsuit*" *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976) *cert. granted*, Feb. 22, 1977 (No. 76-678). (Emphasis added.)

Such early notice would:

> "insure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination since the notice goes from the Secretary of Labor on to the employer involved. In turn this would promote the good faith negotiation of employers during the 60 day conciliation period and provide an opportunity for preservation of evidence and records for use at trial necessitated by failure of negotiation." *Powell* v. *Southwestern Bell Tele-*

> *phone Co.*, 494 F.2d 485, 488 (5th Cir.), *rehearing denied en banc*, 498 F.2d 1402 (5th Cir. 1974). (Emphasis added.)

See also Cochran v. *Ortho Pharmaceutical Co.*, 376 F. Supp. 302, 303 (E.D. La. 1971):

> "Congress has used this method [the notice requirement] of forcing complainants *to speedily present their claims and allow a neutral outside agency an opportunity to mediate, conciliate or arbitrate the matter while it is fresh.* Plaintiff would have us ignore this plain language of Congress and hold that notice of intention to file suit and commencement of a civil action are fungibles. Needless to say, had Congress meant this, it would have omitted Section [626](d) altogether." (Emphasis added.)

Plaintiff concedes that in fact no notice was given by him to the Secretary of Labor until October 9, 1975, concurrently with the filing of his amended complaint in this action and more than three years after the claimed wrongful termination occurred on June 6, 1972 (A 25-26, A 52, Pl. Br. 14). The Department of Labor was unaware of his grievance until he filed a complaint with it on June 27, 1974 more than two years after its occurrence (A 28, A 47).* Nonetheless, plaintiff contends that the filing of

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* While plaintiff plainly appears to concede these facts (Pl. Br. 7, 8, 14) and the complaint and record are not to be contrary (A 25-26, 28, 47, 52), plaintiff does state at one point in his brief, and for the first time in this litigation, that formal notice was given of intent to sue "216 days after the alleged discriminatory act." (Pl. Br. 20). This would mean that the notice was given sometime in 1973 at the latest. There is nothing in the record to support this.

In any event the cases make clear that filing of a grievance with the Department of Labor does not constitute compliance with § 626

(footnote continued on following page)

this complaint with the Department of Labor—albeit some two years after discharge—and the fact that the Department undertook to investigate his charges thereafter—were sufficient to satisfy the "purpose" of the notice requirements of the Age Discrimination Act. This "purpose" is defined by plaintiff as one which simply gives notice at any time to the respondent of the existence of a grievance and permits efforts to conciliate the grievance to commence (Pl. Br. 16-19). Plaintiff's interpretation, which is based primarily on legislative history of Title VII of the Civil Rights Act* and omits all reference to the "promptness" admonition of the statute itself, is simply not supported by the plain language of the statute. As pointed out above, the Age Discrimination Act requires that notice be "promptly" given so that efforts to conciliate may "promptly" begin. The purpose behind this requirement of promptness is to insure that the grievance is handled

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(footnote continued from preceding page)

requirement of filing with the Secretary. *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1251 (10th Cir. 1976) *cert. granted*, Feb. 22, 1977 (No. 76-678); *Hiscott* v. *General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Goodman* v. *Heublein Inc.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,190 (D. Conn. 1976).

Further, although plaintiff contends he was not terminated until October 6, 1972 and that the wrong to him occurred on that date rather than the last date of his employment at RJR Foods on June 6, 1972 (A 26, Pl. Br. 6), it is clear that neither his June 27, 1974 complaint to the Department of Labor nor his October 9, 1975 notification to the Secretary was within 300 days of October 6, 1972.

* Curiously, while plaintiff contends that the legislative history of the Civil Rights Act is an important tool in interpreting the Age Discrimination Act notice requirements (Pl. Br. 15-16), he insists that it is of little relevance in connection with the state action requirements (Pl. Br. 32-35). It should be noted, however, that the requirement of Title VII that charges be filed with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the occurrence of an alleged wrong has been held to be strictly jurisdictional. *Goss* v. *Revlon, Inc.*, Nos. 76-7015, 76-7065, (2d Cir. Oct. 29, 1976); *Weise* v. *Syracuse Univ.*, 522 F.2d 397, 411-12 (2d Cir. 1975).

while fresh and witnesses are available, evidence is retained, and memories do not fade. Plaintiff's overture—made after two full years—can scarcely be said to be "prompt" enough to avoid the possible occurrence of what the statute seeks to prevent by imposing the notice requirements in the first place.

To be sure, although some courts have held that the notice requirements are not strictly jurisdictional in the sense that they cannot be made flexible if the particular circumstances of a given case so warrant, no case has been found in which such a protracted failure of a complainant to give notice as occurred here has been excused. Thus in the recent case of *Dartt* v. *Shell Oil Co., supra*, the Court of Appeals for the Tenth Circuit held that where an employee had filed her complaint with the Department of Labor within nine days of her allegedly wrongful termination and the Department's investigation and consequent notice to Shell began "immediately" thereafter, the promptness requirements of § 626(d) had been met, even though Dartt's formal notice of intent to sue was filed approximately 270 days after the alleged offense (Dartt was subject to the 180 day requirement). Similarly, notice filed within 185 days (*Sutherland* v. *SKF Industries, Inc.*, 419 F. Supp. 610 (E.D. Pa. 1976)) and 210 days (*Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D.N.H. 1975)) were not held to bar federal action. *See also Woodford* v. *Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973) (telephonic notice to Labor Department within 160 days held sufficient compliance with § 626(d)).

In the case at bar, no notice was given for more than 2 years—or over 730 days. Surely the "promptness" required by § 626(d) is not satisfied by notice delayed for this length of time.

B. The Facts of This Case Do Not Require That the 300 Day Filing Period Be Tolled

The requirement of § 626 that notice of intention to sue be given to the Secretary of Labor within 180 or 300 days of the alleged offense has been held to be a strict jurisdictional requirement in the sense that failure to comply with the applicable time limits has constituted a bar to federal action, irrespective of circumstance. *Woodburn* v. *LTV Aerospace Corp.*, 531 F.2d 750 (5th Cir. 1976); *Hiscott* v. *General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Law* v. *United Airlines, Inc.*, 519 F.2d 170 (10th Cir. 1975); *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir.), *rehearing denied en banc*, 498 F.2d 1402 (5th Cir. 1974); *Hayes* v. *Southern Pacific Co.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,196 (C.D. Cal. 1976); *Goodman* v. *Heublein Inc.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,190 (D. Conn. 1976); *Hughes* v. *Beaunit Corp.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,092 (E.D. Tenn. 1976); *Brohl* v. *Singer Co.*, 407 F. Supp. 936, 938-39 (W.D. Fla. 1976); *Raynor* v. *Great Atlantic & Pacific Tea Co.*, 400 F. Supp. 357 (E.D. Va. 1975); *Vaughn* v. *Chrysler Corp.*, 382 F. Supp. 143, 146-47 (E.D. Mich. 1974); *Oshiro* v. *Pan American World Airways, Inc.*, 378 F. Supp. 80, 81-82 (D. Hawaii 1974); *Burgett* v. *Cudahy Co.*, 361 F. Supp. 617 (D. Kan. 1973); *Gebhard* v. *GAF Corp.*, 59 F.R.D. 504, 507 (D.D.C. 1973); *Cochran* v. *Ortho Pharmaceutical Co.*, 376 F. Supp. 302 (E.D. La. 1971); *Grossfield* v. *W. B. Saunders Co.*, 1 Empl. Prac. Dec. (CCH) ¶ 9,941 (S.D.N.Y. 1968).

Indeed, the legislative history of the statute supports this strict construction of the time strictures of § 626 as "a condition precedent" to the bringing of a federal action. H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967) reprinted in U.S. Code Cong. and Admin. News pp. 2213, 2218 (1967):

> "in the case of suits brought by individuals, notice of intention to sue *must be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred.*" S. Re[illegible] 23, 90th Cong., 1st Sess. (1967) 113 Cong. Rec. [illegible] 251. (Emphasis added.)

More recently however, some courts have taken a more flexible approach to the time limits imposed on the notice requirement. While none has held that the statutory requirement may be entirely dispensed with, the courts have shown a willingness, under the appropriate circumstances, to toll the notice requirement. *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1259 (10th Cir. 1976) *cert. granted*, Feb. 22, 1977 (No. 76-678); *Eklund* v. *Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976); *Sutherland* v. *SKF Industries, Inc.*, 419 F. Supp. 610 (E.D. Pa. 1976); *McCrickard* v. *Acme Visible Records, Inc.*, 409 F. Supp. 341 (W.D. Va. 1976); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D.N.H. 1975). Thus, if the plaintiff's failure to file on time has been delayed only a short time (*Dartt, Sutherland, Skoglund*) or if the plaintiff has been misled by the Department of Labor itself as to the time of the notice requirement (*Dartt*) or where an employer has failed to make proper postings required by the Age Discrimination Act (*Skoglund*), the courts have determined sufficient justification exists for tolling the time strictures of § 626(d). In other instances where the plaintiff tarries beyond the 180 days after he becomes aware of the notice requirement and makes no effort to file (*McCrickard*) or cannot show that failure to follow posting requirements affected his late filing (*Eklund*) the courts have been unwilling to bend the time requirements to permit the plaintiff to maintain his federal action.

In the case at bar, the District Court did not determine that plaintiff's failure to file a timely notice of intention to sue was an absolute bar to the maintenance of this action, but after review of the reasons put forth by plaintiff, found that there was no reason not to require plaintiff to have strictly complied (A 72-75). The District Court pointed out that unlike the usual plaintiff in these cases, plaintiff here is a lawyer, not an ordinary layman (A 72). Moreover, plaintiff cannot and does not claim that this tardiness was the result of any detrimental reliance on the advice of the Department. Plaintiff's time to comply with § 626 had long expired when he brought his grievance to the attention of anyone at the Department of Labor. In view of these factors, plaintiff's claims that the Department of Labor took an undue period of time to process his grievance cannot serve as a justifiable excuse (*see* Pl. Br. at 20, 43).

Plaintiff also asserts that RJR Foods was at fault for his failure to file timely notice with the Secretary of Labor because it allegedly "caused" his employment in April 1973 with its alleged "captive" advertising agency Dancer Fitzgerald & Sample in order to "lull him into a false sense of security" and "to prevent the bringing of this action" (Pl. Br. 11, 16-17) (A 66). Plaintiff requests that this Court remand this case for a hearing on this point (Pl. Br. 11).

The District Court considered plaintiff's "vague suggestion" which is not part of the complaint but was raised for the first time at a pretrial conference, that his employment by Dancer Fitzgerald & Sample was "calculated to coincide with the 180 days filing requirement of § 626(d)" (A 74-75). But since the District Court found that the notice requirement began to run when plaintiff was terminated in June, the argument was of limited vitality (A 74-

75).* More importantly, the District Court found after review of plaintiff's affidavit and defendant's response** that his claim that Dancer Fitzgerald & Sample was a "captive" of RJR Foods or that his employment "was part of a plot to extinguish his right to sue" as "altogether insufficient to warrant an evidentiary hearing" (A 75).

Plaintiff points to several other alleged reasons why the notice requirements of § 626 are subject to tolling:

> "a) discharge took place on October 6, 1972 . . .;
>
> b) the defendant itself, by its own request for extension of time to respond to the DOL's inquiry after the expiration of 2 years from Oct. 6, 1972, recognized the applicability of the 3 year statute;
>
> c) the report of the Department of Labor's solicitor recognized that a willful discharge took place, even though he pointed out the difficulty in proving willfulness . . .;
>
> d) the DOL's investigator recognized the applicability of the 3 year statute, as did the solicitor, who subsequently changed his mind;" (Pl. Br. 20).

Each of these four additional reasons which plaintiff advances as justification for his failure to file timely notice is utterly misdirected. Each has to do with whether or not

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* The District Court found that plaintiff had been terminated on June 6, 1972. Thus the wrong complained of occurred on that day and all time requirements began to run from June 6, 1972. In view of this, plaintiff's lawsuit brought in October, 1975 was time barred *irrespective* of whether the 2 or 3 year statute of limitations applies (A 76). See Point III hereof.

** A 64-66. See letter from James W. B. Benkard to Hon. Morris E. Lasker (May 20, 1976).

the three year rather than the two year statute of limitations applies to plaintiff's claims. Whether or not RJR Foods acted "willfully" in this case or whether or not the Department of Labor found that a willful violation occurred is absolutely irrelevant to whether plaintiff has sought to give the Secretary of Labor timely notice of his intention to sue within 300 days of his claimed injury or indeed, sought to have his grievance redressed at the state level if an appropriate mechanism for such redress exists. The issue of willfulness is relevant *only* to the question of whether plaintiff is entitled to take advantage of the three year rather than the two year statute of limitations period provided for in the Portal-to-Portal Act which is applicable to the Age Discrimination Act.* It would be perfectly possible for plaintiff to bring this action within the applicable statute of limitations period, but to be barred from bringing suit at all for failure to file timely notice. *Eklund* v. *Lubrizol Corp., supra*, 529 F.2d at 249-50; *Powell* v. *Southwestern Bell Telephone, supra*, 494 F.2d at 487; *McCrickard* v. *Acme Visible Records, Inc., supra*, 409 F. Supp. at 344; *Brohl* v. *Singer Co., supra*, 407 F. Supp. at 938-39.

Moreover, RJR Foods disputes that its termination of plaintiff was a violation of the Age Discrimination Act, let alone a "willful" one. Indeed, RJR Foods' position that its actions were neither willful nor illegal is supported by the exhibits submitted to the District Court by plaintiff.

> "While our investigation did reveal that some statistical evidence which might arguably show an age

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* The Age Discrimination Act § 626(e) incorporates by reference the limitations period provided in the Portal-to-Portal Act, 29 U.S.C. § 255 which provides that federal actions are time barred if not brought within two years. However, a three year period of time in which to bring suit applies if the violation is willful.

> discriminatory impact in the terminations preceding the company's move from New York to North Carolina, there was no hard evidence to indicate that age was a determining factor in making the decision let alone that age was 'intentional[ly], knowingly, and voluntarily' applied as a factor in the decision making process." Letter from Francis La Ruffa, Regional Solicitor Department of Labor to John D. Davis (Oct. 1, 1975) (A 63).

Plaintiff cites no authority in support of his position that in effect an allegation of willful misconduct or the possible applicability of the three year statute of limitations causes § 626(d) to be read out of the statute. The two provisions are entirely separate. The District Court properly rejected plaintiff's claim that he be excused from compliance with §§ 626 and 633 on this theory (A 73-74). We submit that whether or not plaintiff's discharge was "willful" has no bearing whatsoever on plaintiff's failure to give timely notice.

II

Resort to the New York State Division of Human Rights Prior to the Bringing of a Federal Action Is Mandatory.

By its terms, § 633(b) of the Age Discrimination Act (29 U.S.C. § 633(b)) prohibits the filing of a federal action under § 626 "before the expiration of sixty days after proceedings have been commenced under state law, unless such proceedings had been earlier terminated."*

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* Section 633(b) applies only if the alleged unlawful practice occurs in a state which has a law prohibiting discrimination in employment because of age and which establishes or authorizes a state authority to grant or seek relief from such practice.

(footnote continued on following page)

Plaintiff does not contest the fact that New York's statute procribes discrimination based upon age and establishes an authority authorized to grant or seek relief from such practice and is applicable to this case (Pl. Br. 29-43). Plaintiff further concedes that no proceeding has been brought by him prior to the filing of this action and in fact that none has ever been brought by him (Pl. Br. 40-43). Instead, plaintiff argues that § 633 is optional not mandatory and that his failure to invoke available state processes is no bar to this action (Pl. Br. 29-40). Plaintiff's failure to permit the State of New York an opportunity to exercise primary jurisdiction over his complaint is fatal to his cause of action in the federal courts and warrants dismissal of this action independently of his failure to meet the timely notice requirement of § 626(d).

Plaintiff's essential argument, despite the plain language of § 633(b) that "no suit may be brought . . . before the expiration of sixty days after proceedings have been commenced under the state law", is that the legislative history of the provision, particularly comments made by Senator Javits that administrative delays were to be avoided, gives the complainant a clear license to bypass available state

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(footnote continued from preceding page)

New York's Human Rights Law § 296 (McKinney Executive Law 1972) provides

> "1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Sections 295, 297 and 297-a of the Human Rights Law establish requisite procedures for hearing and determining such complaints by a State Division of Human Rights. Section 633(b) of the Age Discrimination Act is thus applicable to this case.

remedies (Pl. Br. 32-39). Plaintiff's reading of the statute and its history is misplaced.

The plain meaning of the statute's language is that a suit may not be instituted until state administrative proceedings have been in progress for 60 days. If such proceedings are not commenced, 60 days cannot run and the requirement is not satisfied.

Moreover, the language of § 2000e-5(c) of Title VII of the Civil Rights Act (42 U.S.C. § 2000e-5(c)), which contains "virtually *identical* requirements" to § 633(b) (*Rucker* v. *Great Scott Supermarkets,* 528 F.2d 393, 394 (6th Cir. 1976)), provides an instructive analogy.

Section 633(b) parrots the language of § 2000e-5(c) and a number of courts interpreting § 633(b) have noted

> "The minor differences between section 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to the Supreme Court's [interpretations of the latter]". *Goger* v. *H. K. Porter Co.,* 492 F.2d 13, 16 (3rd Cir. 1974).

See also Curry v. *Continental Airlines,* 513 F.2d 691, 693 (9th Cir. 1975).

More importantly, and contrary to plaintiff's assertion, the identity between the two sections is reinforced by reference to the legislative history of the Age Discrimination Act itself. Initially, the bill (S.830) contained only a provision similar to present § 633(a) relating to the preservation of the jurisdiction of a state agency with like functions. During the hearings on the bill, representatives of a number of states suggested the incorporation of comparable Title VII provisions. *See* Age Discrimination in Employment,

Hearings Before the Subcomm. on Labor of the Comm. on Labor and Public Welfare at pp. 16, 102, 234, 90th Cong., 1st Sess. (1967) ("Hearings"). Ultimately, § 633(b), nearly identical in its terms to § 2000e-5(e), was included in the Age Discrimination Act. It is logical to conclude that § 633 (b) is to be construed in the same fashion at § 2000e-5(e). Section 2000e-5(e) has regularly been construed to require primary resort to state remedies as a jurisdictional prerequisite. *Love* v. *Pullman Co.*, 404 U.S. 522, 525-26 (1972); *Motorola, Inc.* v. *Equal Employment Opportunity Comm'n*, 460 F.2d 1245 (9th Cir. 1972); *Equal Employment Opportunity Comm'n* v. *Union Bank*, 408 F.2d 867, 869 (9th Cir. 1968); *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F.2d 267, 268 (4th Cir. 1967), *cert. denied*, 390 U.S. 910 (1969).

A number of courts have adopted the same line of reasoning and have barred a plaintiff's federal claim for failure to institute state proceedings where such procedures were available or otherwise to inform the state of the nature of the grievance so that the state could exercise primary jurisdiction over the matter. *Vaughn* v. *Chrysler Corp.*, *supra*, 382 F. Supp. at 144-46; *Smith* v. *Crest Communities, Inc.*, 9 Empl. Prac. Dec. (CCH) ¶ 10,053 (W.D. Ky. 1974). *See also Goger* v. *H. K. Porter Co.*, 492 F.2d 13 (3rd Cir. 1974).

Indeed, only one authority exists for permitting plaintiffs to completely bypass available state remedies as plaintiff has sought to do here.* This is not a case where the

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* *See Smith* v. *Joseph Schlitz Brewing Co.*, 419 F. Supp. 770, 771-74 (D.N.J. 1976). Plaintiff in *Smith* did, however, notify the Department of Labor within 180 days of the occurrence of his grievance

(footnote continued on following page)

state in question has no statute within the contemplation of § 633(b). *Garces* v. *Sagner International, Inc.*, 534 F.2d 987 (1st Cir. 1976) (Puerto Rico); *Curry* v. *Continental Airlines*, 513 F.2d 691, 693 (9th Cir. 1975) (California)) *Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976) (Illinois). Nor is it a situation where the plaintiff justifiably relied on official advice in neglecting to pursue state remedies, *Arnold* v. *Hawaiian Tel. Co.*, 11 Empl. Prac. Dec. (CCH) ¶ 10,786 (D. Hawaii 1975) or where plaintiff's attempt to file a state action was rejected by an agency because the state's short (6 months or less) statute of limitations had expired. *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E.D. Mich. 1976) and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E.D. Mich. 1976) (Michigan law required complaints to be filed within 90 days. Plaintiffs attempted to file within six months). *Fitzgerald* v. *New England Telephone & Telegraph Co.*, 416 F. Supp. 617 (D. Mass. 1976) and *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N.H. 1975) (Massachusetts law required complaints to be filed within 6 months. Plaintiffs filed after 7 and 9 months respectively). In each of these cases on essentially equitable grounds the courts permitted the plaintiff involved to proceed with his federal claim. Here there simply has been no effort to file with New York's agency within the 365 days that state law provided, indeed,

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(footnote continued from preceding page)

(because plaintiff had been exempted from § 633(b), the court required him to meet the 180 day rather than 300 day notice requirement of § 626(d)). *See also Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 803 (D. Mass. 1975), and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619, 624-27 (E.D. Mich. 1976).

While the court in *Vazquez* v. *Eastern Airlines Inc.*, 405 F. Supp. 1353, 1357, 1360 (D.P.R. 1975) seemed to indicate that resort to state remedies was optional with a complainant, the court also noted that Puerto Rico had no appropriate § 633(b) state agency.

there has been no effort to file at all, and no similar equitable reason appears for waiver of the prerequisite.

Plaintiff's essential argument with respect to his claim that § 633 is optional is based upon Congressional intent to avoid lengthy administrative delays (Pl. Br. 32-33). However, Congressional concern for this problem is reflected in the separate agency mechanism,* the shortened time for federal investigation,** and a provision for concurrent exhaustion of state and federal remedies,*** rather than in an optional state exhaustion requirement. Moreover, that § 633(a) provides for a stay of state action upon the commencement of a federal action is not indicative of an intent to make resort to state remedies optional (Pl. Br. 36), but to accord the state a period of deference in which to attempt to resolve the claim.

> "We agree with the district court, however, that although the Act does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshold period

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* Realizing that EEOC was overburdened, Congress felt age discrimination complaints would best be handled by the Wage and Hour Division of the Department of Labor. 113 Cong. Rec. 31254 (1967). *See also* Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 381 (1976).

** The Secretary of Labor is afforded 60 days' notice under § 626 (d). The EEOC which monitors Title VII, is afforded 180 days in private actions (42 U.S.C. § 2000e-5(f)(1)).

*** Section 633(b) only requires pendency of state proceedings for 60 days prior to *instituting* suits in federal court. Section 2000e-5(c) of Title VII requires 60 days pendency of state proceedings prior to filing a *charge* with the EEOC. Unlike Title VII it appears that exhaustion of state remedies need not be prior to resort to federal action but only that *filing* under a state statute precede institution of federal action. *See e.g., Goger* v. *H. K. Porter Co.*, 492 F.2d 13, 15 (3rd Cir. 1974).

> of 60 days in which it may attempt to resolve the controversy, normally by voluntary compliance." *Goger* v. *H. K. Porter Co.*, 492 F.2d 13, 15 (3rd Cir. 1974).

Plaintiff's other argument is that resort to state remedies is not required because § 633(b) is contextually separate from § 626 and is directed only to the federal-state relationship and thus is not jurisdictional (Pl. Br. 34-35). This argument based on the existence of two statutory sections emphasizes form over substance. First the two sections may simply reflect legislative changes in the bills, since neither § 626(d) nor § 633(b) was in the original bill (*Hearings,* 8-10, 16). Both sections were added after the hearing and § 633(b), is not necessarily intended to be distinct from § 626. Further, the cross references in the two sections indicate that they are to operate in tandem. There would be little point therefore, for the additional 120-days given to plaintiffs in states with a state agency authorized to entertain and remedy grievances based upon age unless it were intended to be enforced in conjunction with the requirement of § 633(b) of resort to state remedies.

Plaintiff asserts in the alternative that in the event compliance with § 633(b) is found to be a necessary precedent to maintenance of his federal action, that the order below be vacated with instructions to retain jurisdiction for a sufficient time to permit plaintiff to institute proceedings with the New York State Human Rights Division (Pl. Br. 40-43).

Plaintiff totally overlooks the fact that his claim could not now be pursued before the New York State agency, since that agency entertains claims which are filed only within one year of the alleged wrong (New York Human Rights Law § 297(5)) (McKinney Executive Law 1972).

That one year statute of limitations expired long before plaintiff ever brought his grievance to the attention of the Department of Labor. Resort to New York State remedies would thus be entirely futile and would not, in any event satisfy the requirements of § 633(b) which contemplates timely and meaningful resort to the state be had.

Plaintiff has made no effort to give New York State any opportunity, let alone a timely one, to hear the merits of his claim as required by § 633(b), nor has he set forth any cogent reason why he should be permitted to circumvent the existing state agency. Instead, he claims conclusorily that he made "a reasonable and good faith effort to protect and pursue his rights under the federal law prohibiting discrimination in employment based on age"; that "nothing he did or failed to do has prejudiced defendant in any way" but that he was

> "prejudiced by his reliance on the U.S. Department of Labor's position with respect to Section 14(b) [633(b)] of the Act, inasmuch as the DOL could not reach a satisfactory settlement for 16 months. Plaintiff was then able to start action as he did." (Pl. Br. 43)

As can be seen from the above, plaintiff has not made every reasonable effort to protect his rights. Indeed, he slept on them for a full two years—before ever attempting to do anything. Plaintiff's claim that "defendant" has not been "prejudiced" is incorrect and at odds with the realities of litigation. Lastly, the fact that the Department of Labor processed plaintiff's claim for some 16 months could not have caused his failure to meet the requirements of either § 626(d) or § 633(b), since the time requirement of those sections had expired before the Department of Labor ever was aware of plaintiff's grievance. Plaintiff simply cannot

claim that had the Department of Labor acted more promptly, he would have met both the jurisdictional requirements of §§ 626(d) or 633(b).

III

Plaintiff's Claims Are Barred by the Statute of Limitations.

The District Court observed in its opinion that

> "Davis suggests that the court should accept the October date; rather than the June date on which he received notice of termination, as the time from which all filing and limitations requirements are to be measured. By his own admission Davis' services for RJR ceased on June 6, 1972. Although he continued to receive his salary and other benefits until October 6th, this in no way prolongs his actual employment with RJR. A logical extension of Davis' reasoning would equate the receipt of pension benefits by a retired employee with continuous employment. Such a proposition is patently without foundation." (A 76)

In short, the District Court found that the wrong alleged by plaintiff occurred on June 6, 1972. Thus, quite apart from plaintiff's failure to give statutory notice and to institute state proceedings, his present complaint is also barred by the statute of limitations.

Since the maximum statute of limitations applicable to the Age Discrimination Act is three years* and plaintiff

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* The Statute of Limitations under the Age Discrimination Act is two years or, if the act complained of can be shown to be willful, three years (29 U.S.C. § 255). RJR Foods in no way concedes that its act in terminating plaintiff was either a wrong or a willful one. However, even if it were willful, plaintiff's federal action is time-barred.

did not bring this action until October 2, 1975, irrespective of plaintiff's failure to meet other jurisdictional prerequisites of the statute, his claim is now time barred.

As the District Court pointed out and Davis admits, his services for RJR Foods ceased on June 6, 1972 (A 25-26). He continued to receive benefits as part of a severance package for the next four months, but rendered no further services (A 26).* The alleged wrong to Davis was his termination which occurred in June, 1972. Receipt of benefits for a short time thereafter in no manner prolongs the occurrence of that event.

Plaintiff's insistence that his "employment" continued until October 6, 1972 is belied by the very terms of the RJR Foods' severance package (A 53-54). Moreover, plaintiff's claim that the "Department [of Labor]'s investigation revealed that it considered October 6, 1972 and not June 6, 1972 as the termination of his employment" (Pl. Br. 8) is refuted by the record herein. The Department of Labor itself indicated to plaintiff that

> "we believe that the courts would probably find that any violation of the ADEA occurred as of June 9, 1972, at the latest, and cannot be construed as 'continuing' until the last receipt of severance pay." (A 63).

In *Hiscott* v. *General Electric,* 521 F.2d 632 (6th Cir. 1975) the on-going receipt of pension benefits allegedly

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* Plaintiff's severance package consisted of 17 weeks' salary to be paid bi-weekly until October 6, 1972, plus his 1972 vacation allowance equal to 3 weeks' salary, and continuation of life insurance and medical insurance for the period during which the bi-weekly salary payments were to be made. The payments were to be paid bi-weekly unless plaintiff accepted employment elsewhere, at which juncture they would be paid in a lump sum (A 53-54).

received as the result of a discriminatory compulsory retirement were held not to constitute a violation continuing beyond the date of actual discharge.

This case is totally unlike that of *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975). There plaintiff was told she would be terminated on November 12, 1973. Her final day of work was November 16, 1973 but she was told to take and was paid for two additional weeks as accrued vacation. The official termination was November 30, 1973. While the issue in the *Moses* case was whether her § 626 notice was timely rather than whether her claims were time-barred, the District Court held that November 30 was the appropriate date from which statutory notice requirements began to run because it was clear that she had been retained on the rolls until that time for all purposes. Here plaintiff received a severance package which although designed to be paid out over several months was also to be paid in a lump sum if plaintiff secured other employment (A 53-54). Plaintiff plainly was not retained on RJR rolls for any other purpose than the administration of this severance package and hence his claims are time-barred.

CONCLUSION

The judgment of Hon. Morris E. Lasker entered on October 8, 1976 dismissing plaintiff's complaint on the ground that plaintiff had failed to comply with two specific jurisdictional prerequisites of the Age Discrimination Act should in all respects be affirmed by this Court. In the alternative, the action should be dismissed as time-barred.

Dated: New York, New York
February 28, 1977

Respectfully submitted,

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Receipt of 3 copies
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